Supreme Court, U.S.
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No. 92-1096

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

SIEU MEI TU and JOSEPH Z. TU,
Petitioners,

v.

SOUTHERN PACIFIC TRANSPORTATION COMPANY; ATCHISON, TOPEKA, SANTA FE RAILROAD COMPANY; PACIFIC FRUIT EXPRESS COMPANY; T. ELLEN; E. E. CLARK; D. W. FEND; T. R. ASHTON; DOE DEFENDANTS ONE TO TWO THOUSAND; WHITE COMPANY; BLACK CORPORATION; BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS; R. B. BRACKBILL; J. M. BALOVICH; SANTA FE SOUTHERN PACIFIC CORP.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF IN OPPOSITION OF RESPONDENTS BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, R. B. BRACKBILL AND J. M. BALOVICH

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the United States Court of Appeals for the Ninth Circuit correctly applied the relevant standards for breach of duty of fair representation when it held the plaintiffs/appellants had failed to meet their burden of proof affirmed the district court's grant of summary judgment?

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STATEMENT OF THE CASE

The plaintiffs/petitioners Sieu Mei Tu ("plaintiff" or "Mrs. Tu) and her husband, Joseph Z. Tue, commenced this suit by filing a state court action against Mrs. Tu's former employer, Pacific Fruit Express Company

("PFE"),[1] the Southern Pacific Transportation Company ("SP"), the Atchison, Topeka and Santa Fe Railroad ("AT&SF"), and various PFE officials ("the railroad defendants"). The complaint, filed September 26, 1986, alleged, inter alia, breach of employment contract, discrimination, loss of consortium on behalf of Joseph Z. Tu, and conspiracy. (R. 5)[2] The suit was then removed pursuant to the railroad defendants' petition for removal to the United States District Court for the Northern District of California. By Order dated April 6, 1988, the District Court granted defendants' motion for summary judgment on all causes of action based on plaintiffs' failure to state a federal cause of action. Declining to exercise pendent jurisdiction over the plaintiffs' remaining state claims, the court granted plaintiffs 30 days leave to file an amended complaint. (R. 284)

Plaintiffs then filed their First Amendment Complaint April 29, 1988. Said complaint was nearly identical to its predecessor but for a newly stated cause of action for breach of duty of fair representation against the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes (the "Union")[3] and two of its officers. The railroad defendants then filed a second motion to dismiss which the District Court granted in part on July 30, 1988. Although the Court found that plaintiffs' complaint had again failed to state a federal cause of action against the railroad, it did assert pendent jurisdiction over the state claims for discrimination and loss of consortium. (R. 304-08)

The Union then filed a motion for summary judgment on January 4, 1989 arguing that plaintiffs' fair repre-

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[1] A wholly owned subsidiary of the Southern Pacific Transportation Company.

[2] "R" refers to the page of the record as filed with the Court of Appeals.

[3] Effective September 1, 1987, the Union changed its name to Transportation•Communications International Union ("TCU").

sentation action was time barred and, even if timely, the allegations contained therein failed as a matter of law to constitute a breach of the duty of fair representation. (Docket Nos. 68-72) The railroad defendants also filed a motion for summary judgment on the remaining state claims of discrimination and loss of consortium. (Docket Nos. 75-79) The Court granted both the Union's and the railroad defendants' motions on February 8, 1989. (R. 890-97)

Pursuant to a motion for reconsideration filed by the plaintiffs on May 3, 1989, the District Court vacated its order as to the fair representation action being time barred and directed the plaintiffs to file an amended complaint by June 2, 1989. (R. 915-18)

On or about June 7, 1989, the plaintiffs filed a Second Amended Complaint which, save for the addition of some irrelevant facts and exhibits, was identical to the First Amended Complaint (R. 919). The Union refiled its motion for summary judgment on June 15, 1989. (Docket No. 117-23) In an Order entered on August 21, 1989, the District Court granted the Union's motion, finding there had been no showing that defendants' conduct was either discriminatory or in bad faith and that plaintiffs had "failed to raise a triable issue of material fact with respect to their claim for breach of duty of fair representation." (R. 1148-49)

Plaintiffs then filed a notice of appeal on September 8, 1989. The Ninth Circuit thereafter denied petitioners' appeal June 1, 1992 (App. Wr. Cert. 67-111).[4] Petition for rehearing was then filed. By Order of September 22, 1992, the Ninth Circuit found the petition was both untimely filed and without merit. (App. Wr. Cert. 112) Plaintiffs/Appellants then made their Application for Writ of Certiorari to Review Memorandum of Decision

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[4] "App. Wr. Cert." refers to the page(s) of the Application for Writ of Certiorari to Review Memorandum of Decision of United States Court of Appeals, Ninth Circuit, filed June 1, 1992.

of United States Court of Appeals Ninth Circuit on December 21, 1992.

STATEMENT OF FACTS

The relevant facts are accurately set forth in the District Court's opinion, and we will only briefly summarize them herein.

The petitioner Sieu Mei Tu was employed as a clerical employee by the Pacific Fruit Express Company from 1962 to 1985. Shortly after being hired by PFE, the plaintiff became a member of the defendant Union Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes (the "Union"), a labor organization representing clerical employees working for PFE. (R. 43, 322, 603)

The plaintiff was covered by various labor agreements between the defendant Union and PFE, including a "protective" agreement referred to as "TOPS." The "TOPS" Agreement permits the carrier to make certain organizational changes, i.e., to abolish and/or transfer positions, but provides that employees cannot be placed in a worse position with respect to compensation as a result of such changes. The agreement further provides that employees are not entitled to "TOPS" protection if their jobs are abolished as a result of a decline in the carrier's business below a level defined in the agreement. (R. 603-05, 616-35)

Sometime in 1985, it was rumored that PFE was planning to permanently close the PFE office at Brisbane, California, and that the general office work performed there was going to be taken back by the SP and performed at its San Francisco headquarters. (R. 126, 605-07) In anticipation of a permanent closing of PFE's Brisbane office, the Union's local chairman there filed a claim under the collective bargaining agreement on behalf of approximately 42 employees on the PFE seniority roster on August 15, 1985. Mrs. Tu was one of the 42

employees. The claim alleged that PFE was wrongfully transferring work to other companies and locations and was taking steps to layoff all the claimants by misapplying the "decline in business" exception to "TOPS" coverage. The Union insisted that employees adversely affected be provided with "TOPS" protection. (R. 607, 646-49)

By mid-September, 1985, PFE, via normal attrition and transfers of positions and work to other locations, had reduced the seniority roster at Brisbane from approximately 42 employees to 17 employees. It then transferred approximately 9 clerical positions to San Francisco. Pursuant to the "TOPS" Agreement, the incumbents of the nine positions were given first preference to follow their jobs. Thereafter, on October 2, 1985, PFE abolished 4 clerical positions, including Mrs. Tu's. As a result, Mrs. Tu and three other employees were laid off and notified that they were not entitled to "TOPS" protection since the abolishment was the result of a decline in business. Four more clerical jobs were then abolished and 4 more employees laid off, including the Union's local chairman, James Balovich. (R. 607-08, 656-62, 671-72)

Grievances over the abolishment of these eight positions, including Mrs. Tu's were progressed to an arbitration held before neutral referee I. M. Lieberman on August 6, 1987. The referee issued his decision sustaining PFE's position that the laid off Brisbane employees were not entitled to "TOPS" protection. Mr. Lieberman concluded that PFE and SP had successfully demonstrated a sufficient decline in business so as to escape any "TOPS" liability to the eight employees. He also concluded that, irrespective of the decline in business defense, a carrier that "takes back" work from a subsidiary has no obligation to provide protective benefits. (R. 612-13, 684-90) Mrs. Tu alleged that the Union did not fairly represent her in this arbitration.

REASONS FOR DENYING THE WRIT

I. PETITIONER'S APPLICATION FOR WRIT OF CERTIORARI IS UNTIMELY FILED.

Rule 13 of the Rules of the Supreme Court of the United States provides in pertinent part:

> .1. A petition for a writ of certiorari to review a judgment in any case . . . entered by . . . a United States court of appeals, . . . shall be deemed in time when it is filed with the Clerk of this Court *within 90 days* after the entry of the judgment. . . .
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> * * * *
>
> .4. The time for filing a petition for a writ of certiorari runs from the date the judgment or decree sought to be reviewed is rendered, and not from the date of the issuance of the mandate (or its equivalent under local practice). However, if a petition for rehearing *is timely filed* in the lower court by any party in the case, the time for filing the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of the petition for rehearing or the entry of a subsequent judgment. (Emphasis added)

In the instant action the petitioners made application for writ of certiorari on December 21, 1992, to review a decision of the Court of Appeals for the Ninth Circuit issued June 1, 1992. The application on its face is untimely filed.

A Motion for Rehearing had been filed with the Ninth Circuit; however, in its order of September 22, 1992, denying the motion, that court found not only that the petition was without merit, but that:

> [B]y his own admission, appellants' lawyer knew of this court's memorandum disposition on June 26 and failed to file a motion to recall the mandate in a timely fashion. (App. Wr. Cert. 112)

As stated above, Rule 13.1 of the Rules of the Supreme Court requires that a petition for writ of certiorari be filed within 90 days after entry of the judgment sought to be reviewed. In the instant case, the relevant date is June 1, 1992. The application for writ, however, was filed December 21, 1992—well over 6 months, and far beyond the 90 day limitations period of the court rule.

It appears the plaintiffs erroneously calculated the 90 day period from the issuance of the order denying rehearing dated September 22, 1992. Their apparent reliance on Rule 13.4, however, is misplaced. The time for filing a petition for writ of certiorari runs from the date of the denial of the petition for rehearing *only* when it is "timely filed". In this instance petitioners' petition for rehearing was not timely filed as was duly noted by the Ninth Circuit in its order. As such, the time for filing ran from the June 1 judgment and lapsed on August 31, 1992.

II. PETITIONER'S APPLICATION FOR WRIT OF CERTIORARI IS WITHOUT MERIT.

This case involves no question of law that is novel, unique or requires review by this Court. As to the respondent Union, the case involves only the question of whether the Court of Appeals correctly canvassed the record in holding that the Union was properly granted summary judgment.

The lower court's affirmance of summary judgment is clearly consistent with this Court's rulings in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986), and *Celotex v. Catreet*, 477 U.S. 317 (1986), holding that parties opposing summary judgment motions may not rely on conclusory statements but must produce evidence sufficient to establish that "a jury might return a verdict in [their] favor." 477 U.S. at 324.

Applicants failed to introduce such evidence below, and the lower court properly affirmed the district court's decision granting summary judgment.

It is clear beyond any doubt that the Court of Appeals correctly stated the standard for duty of fair representation as encompassing conduct which was "arbitrary, discriminatory or bad faith." *Vaca v. Sipes*, 386 U.S. 171, 190 (1967). (App. Wr. Cert. 106) This Court has recently reemphasized that, to establish unfair representation, a plaintiff must show that a union's conduct was "so far outside a wide 'range of reasonableness' as to be wholly irrational or arbitrary." *Air Line Pilots Association v. O'Neil*, 499 U.S. —— (1991), 113 L.Ed.2d 51.

It is equally clear that the Ninth Circuit correctly stated that a plaintiff in an unfair representation case "must also establish the underlying grievance has merit." (App. Wr. Cert. 106) *See also Teamsters v. Terry*, 494 U.S. 558, 564 (1990); *Del Costello v. Teamsters*, 462 U.S. 151, 164 (1983).

Applicants do not argue that the lower court applied the wrong legal standard but, rather, urges that the Union was not entitled to summary judgment. The Ninth Circuit noted that applicants did not introduce evidence of discrimination or evidence to support her claim that the decline in business formula did not apply to her, as found by Arbitrator Lieberman. Instead of introducing such evidence, applicants made reference only to counsel's statements during her deposition and oral argument. (App. Wr. Cert. 107-09) They, in fact, cite in support of the correct standard the same cases relied upon by both the District Court and the Ninth Circuit in granting and upholding the Union's motion for summary judgment.[5] What they attempt to argue, however, is that the facts of this case make it somehow worthy of reviewing *how*

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[5] See pages 48-50, 105-106, and 163-165 of plaintiff/applicant's Application for Writ of Certiorari.

the correct standard was applied. The Supreme Court, however, does not sit to review and analyze facts where no legal issue is to be resolved.

Even so, the applicants are also wrong as to the facts. Applicants fail to make any showing that defendants breached their duty of fair representation by acting in an arbitrary, prejudicial or perfunctory manner sufficient to establish the existence of a genuine issue of material fact.

Petitioners also attempt to assert that a conflict in law among the circuits exists. Citing *McAlester v. United Air Lines, Inc.*, 851 F.2d 1249 (10th Cir. 1988), petitioners claim that the Ninth Circuit's decision was in conflict with the Tenth Circuit as to the preemption of the Railway Labor Act over federal and state tort claims. However, as noted in the appellate court's order, the District Court did not address the claims for violation of 42 U.S.C. §§ 1981, 1983 and 1985, or the conspiracy count in its decision because applicants failed to raise these issues before the Ninth Circuit.[6] Applicants are now precluded from doing so in their appeal to this Court.

Moreover, petitioners misstate the *McAlester* court's holding. In *McAlester* the plaintiff's 42 U.S.C. Section 1981 claim involved alleged disparate disciplinary actions by the employer. The court was quick to point out that the gravamen of the plaintiff's claim in that case was *not* that the provisions of the contract were applied by defendant in a discriminatory way. Rather, the court explained, the plaintiff in *McAlester* was asserting the disciplinary actions were in violation of federal statute. The Tenth Circuit went on to state that, although courts do have jurisdiction over claims based upon federal statutes, courts have no jurisdiction to hear claims arising from provisions of a collective bargaining agreement. *Id.* at

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[6] See footnotes 3 and 4 of the June 1, 1992, Memorandum of the United States Court of Appeals for the Ninth Circuit.

1253. *See also Steelworkers of America v. Rawson*, 495 U.S. 362, 372-73 (1990); *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 406-10 (1988).

In the instant case, plaintiffs' claims against the Union do stem from an alleged violation of a contractual provision. Plaintiff here maintains that she was unfairly represented based upon her denial of protective benefits which she was allegedly entitled to by right under the collective bargaining agreement. *McAlester*, on the other hand, involved an alleged discriminatory discharge but not a claimed violation of a labor agreement. As such, the *McAlester* holding is distinguishable from the case at bar, and there exists no conflict among the circuits.

In summary, we note that, contrary to petitioners' assertions, the decision below presents no question concerning the lower courts' application of law which merits this Court's review and is not in conflict with any decision of the other courts of appeals. Petitioners' argument is, quite simply, devoid of merit. The responsibility of the court below was merely to determine whether there exists any genuine issue of material fact, viewing the evidence in the light most favorable to the moving party, and whether the District Court correctly applied the law. *Ashton v. Cory*, 780 F.2d 816 (9th Cir. 1986). The Ninth Circuit made no error in its review warranting the granting of the application for writ of certiorari in this instance.

Instead, petitioners' request is based upon an erroneous view of the role of the Supreme Court in matters of review. Moreover, petitioners' assertions do not accurately describe the holding below. That determination whether or not correctly decided—and respondents believe it was—does not merit this Court's attention.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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